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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-709

CANADIAN PARKHILL PIPE STRINGING LTD., CANADIAN PARKHILL CONSTRUCTION EQUIPMENT LTD., AND CANADIAN PARKHILL PIPE STRINGING, INC.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Canadian Parkhill Pipe Stringing Ltd. ("Ltd."), Canadian Parkhill Construction Equipment Ltd. ("Construction") and Canadian Parkhill Pipe Stringing Inc. ("Inc.") respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the United States District Court for the Southern District of Illinois, Northern Division (Civil Action P-3161, not published). The case in the Seventh Circuit Court of Appeals bears consolidated Nos. 72-1428 and 72-1899; the opinion has not yet been published but is reproduced at the Appendix to this Petition.

JURISDICTIONAL STATEMENT.

The Petitioners seek review of the judgment of the United States Court of Appeals for the Seventh Circuit rendered on August 1, 1973 reversing the Judgment of the United States District Court for the Southern District, Northern Division, dated September 1, 1972. The judgment raises significant questions with respect to the repugnance of the ruling of the United States Court of Appeals for the Seventh Circuit and of Section 6331(a) and (b) of the Internal Revenue Code of 1954 (26 U. S. C. 6331(a) and (b)) to the United States Constitution, which questions were raised in the United States District Court for the Southern District of Illinois, Northern Division, and on appeal in the United States Court of Appeals for the Seventh Circuit.

Therefore, this Court has jurisdiction under 28 U. S. C. § 1245(1) and § 2101(c).

QUESTIONS PRESENTED.

1. Whether the denial to a defendant of the ability to employ counsel or pay other expenses of legally defending itself in litigation against the United States, effected by the seizure by the Internal Revenue Service, without any judicial hearing, of all of the assets of that defendant constitutes a deprivation of due process under the Fifth and Sixth Amendments to the United States Constitution, without necessity of awaiting the outcome of the trial of the claim of the United States against the unprepared, unrepresented and undefended defendant.

2. Whether Section 6331(a) and (b) of the Internal Revenue Code authorizing the seizure of property of a taxpayer or others by the Internal Revenue Service without prior judicial hearing is violative of the due process provisions of the Fifth Amendment and Sixth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution:

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code 1954, 26 U. S. C. 6331(a) and (b):

6331(a) AUTHORITY OF SECRETARY OR DELEGATE.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the

accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

6331(b) SEIZURE AND SALE OF PROPERTY.—The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

STATEMENT OF THE CASE.

The Seventh Circuit Court of Appeals has ruled that the question of denial of constitutional rights cannot be determined until after a "trial," where all of the assets of a corporate taxpayer and its two corporate affiliates have been seized and withheld by the unilateral action of the Internal Revenue Service, without judicial hearing, with the result that the corporate taxpayer and its affiliates are stripped and deprived of all means of obtaining effective legal representation in the prospective trial of the issues as to their rights as against the United States to the very assets seized.

Canadian Parkhill Pipe Stringing Ltd. ("Ltd.") is a Canadian corporation, which, prior to the events here recounted, had been engaged in performance of pipe stringing projects in Canada, and in the ownership of the capital stock of its two wholly-owned subsidiaries, Canadian Parkhill Construction Equipment Ltd., a Canadian corporation ("Construction") and

Canadian Parkhill Pipe Stringing Inc., a New York corporation ("Inc."). Inc.'s business was the performance of pipe stringing and pipe laying projects in the United States. Construction's business was the ownership of pipe stringing and pipe laying equipment which it leased to Ltd. and to Inc. and to others for the performance of such projects.

All three Parkhill corporations have been put out of business by the action of the Internal Revenue Service.

The principal executive offices of all three Parkhill corporations were at Toronto, Ontario, Canada. When a project was in progress, a moving field office of the corporation performing that project was maintained near the sight of the project. Payrolls were made up and paid at such field office and supplies were purchased from local bank accounts; payroll and other records in regard the project were kept and withholding tax returns prepared there by field office personnel.

In the summer of 1969 Inc. performed a pipe laying project in central and southern Illinois for Natural Gas Pipeline Company. The project was completed at or near Princeton, Illinois in early October. Inc. had used equipment of Construction in the project, and after completion the equipment was temporarily stored in a field near Princeton, Illinois.

In early February 1970 the Internal Revenue Service made an assessment *against Inc.* for an aggregate of $793,416.73 for withholding taxes on wages allegedly paid on the Natural Gas Pipeline project during the third and fourth quarters of 1969.*

* There is substantial dispute as to the amount of this tax liability. Inc. contends that large portions of the "wages" shown on the Forms 941 prepared by field office employees and filed on behalf of Inc. for these periods and on which the assessment is based, were in fact embezzlements by unfaithful field employees of Inc., on which no withholding tax would be due, and that Inc. is entitled to set-off for "withholding" actually paid to the government on prior embezzlements of the same nature. Counsel for the Parkhill companies have presented substantial evidence of such embezzlements to the Department of Justice and demanded action to discover further facts. To date the Justice Department has reported that neither it nor the Internal Revenue Service has taken any action against the alleged embezzlers and have refused to state why.

On or about February 17, 1970, the Internal Revenue Service served notices of levy upon all of the assets of Inc., principally accounts receivable from Natural and from one other pipeline owner for which a project had been completed earlier in the year.** On February 17, 1970, without hearing of any kind, the Internal Revenue Service, purportedly acting pursuant to the authority of Section 6331(a) and (b) of the Internal Revenue Code, seized all of the pipe laying equipment at Princeton, Illinois. The Internal Revenue Service thereafter steadfastly refused all demands of Construction and Ltd. that the equipment be released and only upon being convinced that its value was depreciating by exposure to the elements did the Internal Revenue Service finally consent to the sale of the equipment and deposit of the proceeds in escrow with the Northern Trust Company, Chicago, to preserve the value. The escrow agreement was signed on or about May 26, 1970. It preserved all the rights of the parties, and transferred them from the equipment to the proceeds. On July 16, 1970 the equipment was sold at public auction at Princeton, Illinois for in excess of $1,100,000.

Litigation ensued in the United States District Court for the Southern District of Illinois, Northern Division (Peoria, Illinois). That Court's jurisdiction and venue were based upon 26 U. S. C. § 7426, 28 U. S. C. 1346(e), § 2410 and § 2463, and 28 U. S. C. 1402(c). The initial phases of that suit involved a contest between the United States and a chattel mortgagee of certain of the equipment. That resulted in the payment from the escrow of $556,000 to Avco Delta Corporation Canada, Ltd., the chattel mortgagee, pursuant to the order of the United States District Court for the Southern District of Illinois, Northern Division, *Avco Delta Corporation Canada, Ltd.* v. *U. S.* 321 F. Supp. 241 (1971), affirmed the Seventh Circuit Court of Appeals, 459 F. 2d 436 (1972).

** Also a double jointing rack located at Poteau, Oklahoma, the approximately $160,000 proceeds of the sale of which were ultimately divided equally between the United States and an alleged chattel mortgagee pursuant to order of the United States District Court, Tulsa, Oklahoma.

After payment of the costs of the auction sale and several minor transactions as to which the Internal Revenue Service and other parties were able to agree, there remained in the escrow approximately $600,000 principal, which has, through investment in U. S. Treasury Bills, since grown to approximately $640,000 as of October of 1973.

The payment of the $556,000 to Avco Delta Corporation Canada, Ltd. left a deficiency owing upon Construction's obligation to Avco Delta Corporation Canada, Ltd. That debt had been guaranteed by Ltd. and the payment of that balance, plus payment of approximately $18,000 for expenses and fees of counsel at Tulsa, Oklahoma, Peoria, Illinois and Chicago, Illinois in the early stages of this litigation has left the Parkhill companies in the following financial circumstances:

Inc.: Has $205,000 receivable from Natural which has been paid into court in this case. Inc. contended that this was payable to the Internal Revenue Service, as subject to its notices of levy of February 17, 1970. The Seventh Circuit has ruled that the Internal Revenue Service must share it pro rata wi[illegible] other claimants (Opinion, August 1, 1973). Inc. has no interest in that fund other than to see it applied to its tax obligation. Inc. has no other assets.

Construction: Claims the $600,000, plus interest, proceeds of the sale of its equipment now deposited in escrow at Northern Trust Company, Chicago and of which the United States refuses to release any portion. Construction has no other assets.

Ltd.: Owns the stock of Inc. and Construction, owns its office furniture (possibly worth $1,500) and a ten-acre gravel pit at North Bay, Ontario appraised at from $300 to $500 and for which it has not been able to find a buyer at any price. Ltd. has no other assets.

Construction and Ltd. introduced into this record in November of 1971 as exhibits to a motion for partial summary judgment, uncontradicted evidence establishing that there can be no question but that a great majority of the equipment of which

the escrow fund is the proceeds, had been the property of Ltd. and then Construction for many years prior to the accrual of the alleged tax liability of Inc. for which the Internal Revenue Service seized those assets.*

In April of 1972, almost two years after the initial seizure of the equipment, the United States filed its Amended Answer and Cross Claim herein to claim for the first time that it was entitled to its seizure of the equipment because each Ltd. and Construction and Inc. is the alleged alter ego of the other. The United States had assiduously avoided any such contention during the pendency during the previous two years of its disputes with Avco Delta Corporation Canada Ltd., chattel mortgagee of a portion of the equipment, as such a contention then would have defeated the United States' position taken in that litigation. Faced with the motion for summary judgment, however, the Amended Answer and Cross Claim was apparently seen as the only way the United States could raise a question of fact as to which party was entitled to the proceeds of the equipment.

The United States has therefore seized equipment, a substantial majority (if not all) of which it admits to be the property of Construction or Ltd., and seeks to apply it to taxes allegedly owing by Inc. It justifies that seizure upon the allegation made by an attorney of the Justice Department on information and belief in an amendment to a pleading filed over two years after the seizure, that the attorney believes that there may be an alter ego relationship between the three Parkhill companies. In this instance that equipment (or now its proceeds) happens to be *all* of the assets of Construction and (through it) Ltd.

The United States contends that based upon the unilateral action of some anonymous tax collector in issuing a seizure order in 1970 and upon the allegation of an attorney in the

* Construction contends that with minor and insignificant exceptions, *all* of the equipment belonged to it. The motion for partial summary judgment covered only those items as to which the documentation then available precluded the raising of any "genuine issue as to any material fact" regarding that ownership.

Justice Department that he believes that the Parkhill companies may have an alter ego relationship, Construction and Ltd., which have been deprived of *all* of their assets by the seizure, may not have access to those assets to defend against the action of the United States in seizing them.

The District Court held that the denial to the defendants of access to that fund to defend themselves would constitute a denial of due process. The District Court released $60,000 of the fund to the defendants to employ counsel and defray expenses of defense against the United States' action.

The Seventh Circuit, based upon one of its prior decisions (of which no review was sought to this Court) ruled that it could not be determined until after a "trial" whether the Parkhill companies or any of them had been or would be denied a constitutional right. The order of the Seventh Circuit is that the case be remanded to the District Court for a "trial" at which the Parkhill companies would not be represented by counsel—or if counsel was present at the trial by order of the District Court, that counsel would in any event be unprepared, having been denied funds with which to conduct the extensive discovery which will be necessary to defend this suit.

The Seventh Circuit stated that perhaps its other rulings in the same case might induce other parties indirectly interested in this aspect of the case to come to the aid of the Parkhill companies, to the extent that their interests might be served thereby. If they do, it is certain that it will not be beyond the scope of their own interests, which are generally adverse to those of Construction and Ltd. The Seventh Circuit was not too optimistic about that prospect. It went on to add at p. A.26:

> "The Government should be on notice, however, that we will carefully scrutinize any further appeals to see if in fact Parkhill has been denied due process of law by a constitutionally violative overreaching by the Internal Revenue Service."

The Seventh Circuit has at least implied doubt as to the possibility of these corporations receiving a fair trial in the

circumstances, but in accordance with its own prior ruling referred to in its opinion has insisted that the fact be demonstrated at a "trial".

In addition to these civil disputes, the Internal Revenue Service has given notice that it will seek criminal indictments against Inc. and against H. B. Sceats (a Canadian citizen and resident), the President of each of the Parkhill companies, charging fraud in connection with the filing of certain of the tax returns of Inc.

ARGUMENT.

I. Denial of Due Process Is Demonstrated by the Depriving of Parkhill Companies of Representation by Counsel or Its Counsel the Opportunity to Prepare for Trial, Without Necessity of Awaiting the Result of Trial Without Such Counsel or Preparation.

On or about April 18, 1972, the United States filed its Amended Answer and Cross Claim in the District Court. In that document signed by an attorney of the Justice Department, it alleges "on information and belief" that Ltd., Construction and Inc. are "the mere *alter ego* of each other." The United States interposed the alter ego assertion to counter conclusive evidence of the ownership by Construction (and before it Ltd.) for many years of a substantial portion of the equipment which had been sold at the July 16, 1970 auction at Princeton, Illinois, the proceeds of which is the principal subject of this litigation. That ownership evidence had been filed with Construction's motion for partial summary judgment on November 30, 1971.

The United States has admitted that it has seized the property of Construction, a third party, to apply against the alleged tax liability of Inc. It seeks to justify that action by the allegation of "alter ego," and it seeks to deprive Construction, Ltd. and Inc. of the opportunity of defending against that action by refusing access to any portion of the seized assets, which are

their only assets, and which are admittedly the prima facie property of Construction.

The action of the United States has made it impossible for the Parkhill companies to employ counsel, unless they are successful in employing counsel who are willing to assume the risk that the government will lose this litigation, with the result that there will be funds available to pay attorneys' fees. Litigation cannot be conducted without incurring expenses and substantial expenses will be incurred, in addition to attorneys' fees, in defending this action properly.

An attorney may not properly agree with the client that the lawyer shall pay or bear the expenses of litigation (ABA Code of Professional Responsibility, DR 5-103(b); 8 A. L. R. 3rd 1155, "Validity and propriety of arrangement by which attorney pays or advances expenses of client."). An attorney who undertook the defense of this action necessarily would have to bear them out of his own pocket if he was unsuccessful, since the government's claim exceeds the assets available to pay it. Hence, the action of the United States has made it impossible, even if Construction should succeed in employing an attorney on a contingent basis, to properly prepare a defense.

Disregarding the threat of criminal prosecution, it is plain that the United States' effective denial of the right of Construction, Inc. and Ltd. to counsel in this civil litigation constitutes a violation of due process. A corporation may not defend suits in the courts except through licensed attorneys. *Remole Soil Service, Inc.* v. *Benson,* 68 Ill. App. 2d 234 (1966); *Flora Construction Co.* v. *Firemen's Fund Ins. Co.,* 307 F. 2d 413 (C. A. 10, 1962); *United States* v. *9.19 Acres of Land,* 416 F. 2d 1244 (C. A. 6, 1969). This is true even of an "indigent" corporation. *The Union Savings Association* v. *Home Owners Aid, Inc.,* 23 Ohio St. 2d 60, 262 N. E. 2d 558, 560 (1970).

"A fundamental requirement of due process is 'the opportunity to be heard," *Grannis* v. *Ordean,* 234 U. S. 385, 394. It is an opportunity which must *be granted at a meaningful time*

and in a meaningful manner." (Emphasis added.) *Armstrong* v. *Manzo*, 380 U. S. 545, 552. The right to a hearing includes the right to appear by counsel. *Chandler* v. *Fretag*, 348 U. S. 3, 9, 10. This right exists, not only in criminal cases, but in civil cases as well. *Powell* v. *Alabama*, 287 U. S. 45, 68, 69; *Roberts* v. *Anderson*, 66 F. 2d 874 (C. A. 10, 1933); *Prudential Ins. Co. of America* v. *Small Claims Court*, 76 Cal. App. 2d 379, 173 P. 2d 38, 39; *Arizona State Department of Public Welfare* v. *Barlow*, 80 Ariz. 249, 296 P. 2d 298 (1956).

Thus, in the *Powell* case, as long ago as 1932, this Court said (p. 68):

> "What, then, does a hearing include? Historically and in practice, in our own country, at least, it has included the right to the aid of counsel when desired and provided by the party asserting the right * * * If in any case, civil or criminal, a state or federal court will arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

Over the years, this Court has steadily expanded the right to counsel in criminal cases. In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the Court held that an accused has a constitutional right to counsel in a felony case. And only this last term it extended this right to misdemeanor cases where a jail sentence could be imposed. *Angersinger* v. *Hamlin*, 407 U. S. 25 (1972).

The right to counsel in a criminal case attaches before the trial commences. In *United States* v. *Wade*, 388 U. S. 218 (1967), the Court, in holding that the defendant was entitled to counsel at a "lineup," said at p. 226 that "in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." And in

Mempa v. *Rhay*, 389 U. S. 128, 134 (1967), the Court said, "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."

As in a criminal case, for the right to counsel to be a meaningful one, a defendant in a civil case must have the services of counsel at every stage of the proceedings where his substantial rights may be affected; that is to say, at all stages after the action is commenced. No counsel can properly defend a case without preparation, such as interviewing witnesses, participating in discovery, engaging in legal research, and the like. The due process clause then also forbids the government in a civil case from disabling a defendant's counsel from preparing his defense prior to trial. The right to counsel at trial would be meaningless if counsel came completely unprepared.

The Seventh Circuit Court of Appeals has ruled (embracing the United States' arguments) that it cannot be determined until after trial whether this circumstance will result in a denial of due process. The following quotation is from Judge Duffy's dissent in *United States* v. *Brodson*, 241 F. 2d 107, 111 (1957) (CCA 7):

> "Here the Government, by its deliberate act, by a jeopardy assessment, captured the defendant's assets and thus denied him the use of his own funds to defend himself; the tools of defense were taken from him; the Government pauperized him by placing him in a financial straight-jacket.
>
> "Due process of law requires that convictions cannot be brought about by methods that offend a sense of justice. Rochin v. People of State of California, 342 U. S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183. As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. Lisenba v. People of State of California, 314 U. S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166. The tactics of the Government in this case in preventing defendant from utilizing the necessary tools of defense cer-

> tainly offends my sense of justice. There were no elements of fairness present in the Government's tactics."

The pitting of an undefended, unrepresented and unprepared corporation against the United States, represented by the Department of Justice, in turn backed up by the Internal Revenue Service, in a "trial" to determine whether the United States will be entitled to keep $600,000 seized administratively from that undefended corporation, is a circumstance the mere contemplation of which should offend anyone's "sense of justice." Only by engaging in the wildest speculation can it be imagined that the United States will not prevail *regardless of the merits of the case.*

Nevertheless, the Seventh Circuit has held, in accordance with its prior ruling in *Illinois Redi-Mix Corp.* v. *Coyle,* 360 F. 2d 848, that the denial of due process cannot be determined until after a trial. That is not what common experience dictates. That "trial" would be a useless waste of time for all concerned.

This Court observed in *Fuentes* v. *Shevin,* 407 U. S. 67 (Nos. 70-5039 and 70-5138) (June 1972), at p. 82, citing *Stanley* v. *Illinois,* 405 U. S. 645, 647:

> "This Court has not embodied the general proposition that a wrong may be done if it can be undone."

II. The Provisions of Section 6331(a) and (b) of the Internal Revenue Code Authorizing the Seizure of Assets by the Internal Revenue Service Without the Prior Opportunity of a Judicial Hearing Is Violative of the Due Process Guarantees of the Fifth Amendment of the United States Constitution.

On or about February 17, 1970, without any prior judicial hearing of any kind, the Internal Revenue Service seized the pipe laying equipment which was located at Princeton, Illinois and effectively seized the account receivable from Natural Gas Pipeline Company by serving a notice of levy upon that organ-

ization. Since that time, and since the commencement of this litigation seeking clarification of the rights of the parties herein to the proceeds of the sale of the pipe laying equipment, this Court has decided the case of *Fuentes* v. *Shevin*, 407 U. S. 67.

In the *Fuentes* decision, this Court declared unconstitutional the replevin statutes of the states of Florida and Pennsylvania on the ground that those statutes constituted state action authorizing a plaintiff to seize assets in the possession of a defendant without the opportunity to the defendant to have a prior judicial hearing as to the right to possession of the asset. This Court ruled that those state statutes denied the defendants the due process guaranteed to them pursuant to the Fourteenth Amendment to the United States Constitution.

While the Fourteenth Amendment prohibits a state from depriving a person of his property without due process of law, the Fifth Amendment to the United States Constitution provides a similar restraint upon federal action. The standards are the same.

It is submitted that the provisions of § 6331(a) and (b) of the Internal Revenue Code authorizing the seizure of property by the Internal Revenue Service without any prior judicial hearing constitutes a violation of the constitutional rights of the possessor of that property just as much if not more than the provisions of the Florida and Pennsylvania replevin statutes.

Pursuant to the Pennsylvania and Florida replevin statutes, which were declared unconstitutional, the plaintiff, prior to obtaining a writ of replevin, was required to post a bond in an amount double the value of the property to be seized to indemnify the defendant against such damage as might occur should the writ of replevin be found to have been issued without grounds or otherwise improperly.

Under the procedure by which the pipe laying equipment of Construction and the account receivable of Inc. have been seized by the United States not only was there no judicial hearing prior to seizure but no bond was required of the United States, and in

fact, if it should turn out that the property was wrongfully seized, the injured party has no recourse against the United States for the damages suffered. An anonymous tax collector may without any notice to a taxpayer make an assessment against that taxpayer and thereafter upon ten days' notice but without any hearing whatsoever may seize the property of the taxpayer for application to the alleged tax obligation in such amount as the tax collector may in his sole discretion, and without the necessity of prior notification or discussion with the taxpayer, decide is owing.

If the execution of a writ of replevin under the Florida and Pennsylvania statutes constituted a violation of due process, clearly the procedures employed by the Internal Revenue Service under Section 6331(a) and (b) of the Internal Revenue Code constitute at least an equal violation of a person's constitutional right not to be deprived of his property without due process of law.

Respectfully submitted,

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APPENDIX.

The opinion of the Seventh Circuit Court of Appeals is set forth in full. That portion pertinent to this Petition for Certiorari appears at pp. A.24 through A.27.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972—January Session, 1973

Nos. 72-1428 and 72-1899
AVCO DELTA CORPORATION CANADA LTD.,
vs. *Plaintiff,*
UNITED STATES OF AMERICA, CANADIAN PARKHILL PIPE STRINGING, INC., d/b/a PARKHILL PIPELINE, INC., CANADIAN PARKHILL PIPE STRINGING, et al.,
Defendants,
NATURAL GAS PIPELINE COMPANY OF AMERICA, et al.,
Third Party Defendants.

ALBERT & HARLOW, INC., a/k/a ALBERT EQUIPMENT, INC., STANDARD SERVICE AND SUPPLY CO., and RUSSELL B. SCOTT, d/b/a SERVICE PARTS SUPPLY CO.,
Counterdefendants-Appellants,
vs.
UNITED STATES OF AMERICA, and CANADIAN PARKHILL PIPE STRINGING, INC., et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Illinois, Northern Division.

Civil No. P-3161

ROBERT D. MORGAN,
Judge.

UNITED STATES OF AMERICA, et al.,
Defendant-Appellant,

vs.

WOLF BATTERY & ELECTRIC, INC., WOLF-JACOBSON, INC., CLIFFORD RYGH, et al., Trustees of CENTRAL LABORERS PENSION FUND, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, JACKSON P. NEWLIN, and FRANK O. WETMORE, II,
Counterdefendants-Appellees,

CANADIAN PARKHILL PIPE STRINGING, INC., a/k/a PARKHILL PIPE STRINGING, INC., CANADIAN PARKHILL PIPE STRINGING LTD., and CANADIAN PARKHILL CONSTRUCTION EQUIPMENT LTD.,
Cross-Defendants-Appellees.

Argued January 18, 1973—Decided August 1, 1973

Before FAIRCHILD, CUMMINGS, and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* These appeals involve various claimants to two funds presently held in *custodia legis* by the district court.[1]

I

One fund originally consisted of $216,337.44 which was deposited with the court by Natural Gas Pipeline Company of America (Natural), a third party defendant in the suit, under a counterclaim of interpleader under 28 U. S. C. § 1335. The

1. These two cases were argued and briefed separately; however, the overlap of the material facts as well as of the legal principles involved in the disposition of the two cases has led us to consolidate them in one opinion.

funds had been retained pursuant to the provisions of a construction contract between Natural and Canadian Parkhill Pipe Stringing, Inc., a/k/a Parkhill Pipeline, Inc. (Parkhill, Inc.), a defendant in the initial suit and now a counterdefendant. The pertinent provisions of the construction contract concerning this retainage are as follows:

> 120 Invoicing and Payment
>
> .1 . . . .
>
> .3 Each invoice shall be paid by the Company [Natural] to Contractor [Parkhill] on or before the tenth (10th) office day of Company following receipt of such invoice at Company's Chicago office, subject, however, to the following:
>
> .31 Company shall retain ten (10%) per cent of all invoices (hereinafter referred to as "retainage"), except invoices for extra work, and such retainage shall be paid to Contractor:
>
> .311 After Contractor has been notified by Company in writing that all work to be done under this Contract is completed to Company's satisfaction; and
>
> .312 After Contractor has furnished Company with an affidavit (on Company's Form E/C 22), signed by Contractor, stating that all bills, claims and charges for materials, labor, supplies, equipment and services incurred by Contractor in connection with said work have been fully paid and receipts or other proper evidence of such payment are in the possession of Contractor and that Contractor has fully paid and satisfied all liability for contributions, payroll and payroll taxes, use tax or other forms of taxes, fees, licenses, excises or payments, required by Federal and state legislation and local ordinances, and has fully complied with all requirements

thereunder, as to all persons employed and property and material furnished in the performance of said work; and

.313 ....

.314 With respect to Contracts wherein the total contract price is $25,000.00 or more, after a reasonable period has elapsed subsequent to the expiration of all time periods, fixed by the laws of the State in which said work is performed, within which liens may be filed against the property of the Company ....

.32 The final invoice shall be paid by Company to Contractor only after the requirements of Sub-Parts .311 and .312 have been satisfied.

.33 Company may withhold from any invoice, retainage or other payment due, any amount which in its judgment is necessary to secure Company against any and all claims asserted against Company or Contractor and payable by Contractor, and for any claim of Company against Contractor, whether such claim is liquidated or unliquidated and whether or not such claim arises by reason of the operations of Contractor hereunder or from operations of Contractor independent of this Contract. When any such claim becomes liquidated, Company may, at its option, apply in settlement of such claim any amounts up to the total amounts withheld under this Sub-Part .33. In such event, if the remaining balance of such amounts withheld shall exceed the amount applied by Company to settle claims pursuant hereto, such excess shall be paid by Company to Contractor; and if the amount paid by Company in settlement of claims pursuant here-

> to shall exceed the total amounts withheld, Contractor shall pay the difference to Company.[2]

Natural alleged that Parkhill, Inc., had failed to furnish the affidavit required by the above portions of the contract and had otherwise failed to demonstrate that all of the above mentioned liabilities had been satisfied.

Natural named as counterdefendant Parkhill, Inc., which claimed to be entitled to the entire amount, the United States, which had filed federal tax liens against Parkhill, Inc.,[3] and a multitude of other potential claimants who were creditors of Parkhill, Inc., most of whom could be classed as either laborers, materialmen, or subcontractors. Natural itself also claimed the right to set-off from the retainage in the amount of $11,423.33, which right arises under subparagraph .33 of Part 120 of the construction contract set out above. Finally, Natural alleged that Great American Insurance Company of New York, which Parkhill, Inc., had obtained as surety on a Labor and Material Payment Bond, "has refused and failed to perform its obligations under said bond."

Of the various counterdefendants who filed claims to the retainage, aside from Parkhill, Inc., and the United States, we

2. Although no party has seen fit to include an original copy of the construction contract in the record before us, there does not appear to be any reason to doubt that these provisions alleged in the counterclaim by Natural are the pertinent portions of the contract.

3. The Government in its answer to the counterclaim of Natural allegd the following facts:

> A delegate of the Secretary of the Treasury made an assessment against Canadian Parkhill Pipe Stringing, Inc., for withholding and F. I. C. A. taxes for the third and fourth quarters of the year 1969 in the respective amounts of $778,447.10 and $13,677.96 on February 6, 1970. A delegate of the Secretary of the Treasury filed Notices of Liens as follows: Secretary of State for the State of New York, February 9, 1970; Recorder of Deeds of Bureau County, Illinois, February 16, 1970; Clerk's Office of Tulsa County, Oklahoma, April 21, 1970; and with the Recorder of Deeds, Washington, D. C., May 12, 1970.

need consider only six. Albert Equipment Co., formerly known as Albert & Harlow, Inc., filed a claim for $25,304.14. Service Parts Supply Co. claimed $23,579.33 and alleged that it had filed a lien under the Illinois Oil and Gas Lien Act, Ill. Rev. Stat. 1971, ch. 82, § 78. Standard Service & Supply Co. filed a claim for $11,845.76 and also alleged that it had complied with the Illinois Oil and Gas Lien Act. Both Service Parts and Standard Service & Supply cross-claimed against the surety, Great American Insurance Company of America (Great American). After the claimants answered interrogatories propounded by counsel for Parkhill, Inc., Parkhill moved for summary judgment against the above three claimants on the ground that in fact none of them had properly perfected any lien rights against the pipeline property of Natural in accordance with the applicable Illinois lien laws. The district court on February 25, 1972, dismissed the above three claimants from the case, although it at the same time granted default judgments in the amounts of their cross-claims against Parkhill. They have appealed in cause No. 72-1428. None of the other claimants dismissed by that order have appealed.

Wolf-Jacobson, Inc., filed a claim for $759.80 arising from a judgment it had obtained against Parkhill, Inc., on March 25, 1970, with garnishment proceedings against Natural, as garnishee, begun on March 30, 1970. Wolf Battery & Electric Service, Inc. (the two will jointly be referred to hereinafter as "Wolf") also claimed $977.79 under a March 25, 1970, judgment against Parkhill, Inc., and a March 30, 1970, garnishment against Natural. Finally, Clifford Rygh, et al., Trustees of Central Laborers Pensions Fund (Laborers), filed a claim for $23,616 based on a garnishment suit in the state court against Parkhill, Inc., with Natural as a garnishee defendant, instituted April 6, 1970, but not having reached judgment. The district court in a memorandum decision held that Wolf's claims "are exactly the type of claim from which the Retainage was intended to shield Natural, and further that Natural could have rightfully paid these claims under the contract."

Apparently on the rationale that Parkhill, Inc., could not have acquired a property interest in that portion of the retainage and that the Government's tax lien therefore could not have attached, Wolf's judgments were ordered paid in full from the retainage. As to the Laborers' claim, the court held that "by joining Natural as garnishee in their suit they have attained a position substantially the same as that of the two Wolf companies, and therefore they should recover on the same theory." The district court further allowed Laborers reasonable attorney's fees under Ill. Rev. Stat. 1971, ch. 13, § 13. The Government appeals in cause No. 72-1899 from this order.

As we understand the district court's theory of the case it is that Wolf and Laborers were properly claimants directly against the retainage because they had obtained liens against that fund; that the United States had obtained rights in the fund through Parkhill, Inc.; and that although Albert & Harlow, Standard Service, and Service Parts Supply were now judgment creditors of Parkhill, Inc., based on the default judgment entered at the time the court dismissed their claims against the interpleaded fund, their rights were necessarily inferior to those of the United States under its prior tax lien which would consume all of the rest of the retainage, thus meriting dismissal of their claims against the interpleaded funds. For the reasons hereinafter given we reverse these holdings.

If the Government is correct that Parkhill, Inc., has the sole property right in the retainage (less the set-off paid to Natural by order of the district court on August 22, 1972), then the issue would be one solely of lien priority. The law is quite clear that as to questions of priority of liens in the tax field federal law controls. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 49 (1950). Thus, in *Security Trust* the Court held that a federal tax lien had priority over an attachment lien recorded prior to the Government's lien but in which judgment was obtained only after the Government's lien was filed. A similar result was reached in *United States* v.

City of New Britain, 347 U. S. 81, 84 (1954), where it was held that in order to defeat a federal tax lien a prior lien valid under state law must be choate, that is, "when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." Only when the lien provided for by state law became choate would the Court apply the maxim "the first in time is the first in right."

Security Trust was followed in *United States* v. *Acri*, 348 U. S. 211 (1955), to defeat an Ohio attachment lien deemed "an execution in advance" by the state courts, and in *United States* v. *Liverpool & London & Globe Insurance Co., Ltd.*, 348 U. S. 215 (1955), to defeat a prior Texas garnishment lien where judgment was not obtained until after the federal tax lien had been filed. More recently, the Court in *United States* v. *Pioneer American Insurance Co.*, 374 U. S. 84 (1963), gave priority to a federal tax lien against a mortgagee's claim for reasonable attorney's fees awarded in prosecuting a foreclosure suit where the federal tax lien was recorded after the institution of the foreclosure suit but prior to the entry of the judgment determining the amount of the attorney's fee, the decision being based on the theory that the amount not being specifically known, the attorney's fee lien was not choate. Thus, the Government argues that, its tax lien having been filed prior in time to any of the other claimants having obtained a choate lien, it should have absolute priority over all the claimants.[4]

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4. At oral argument, counsel for one of the claimants alleged for the first time since Parkhill, Inc.'s principal executive office was located in Canada, the Government's lien did not attach to the retainage (personal property) until it was filed in the District of Columbia. 26 U. S. C. § 6323(f)(2)(B). Under this view, Wolf would be a prior judgment lien creditor on its garnishment and would have priority, under the Supreme Court's decisions, over the Government. 26 U. S. C. § 6323(a). Since we are holding that the Government's contention that Parkhill, Inc., had a valid property interest in the entire retainage is incorrect, we will not attempt to resolve the issue except to note that, in the counterclaim for interpleader, Natural alleged that Parkhill, Inc., was a New York corporation.

We also do not have to consider Laborers' claim that even though

The cited authorities are well established but they do not decide the case before us as the Supreme Court has also clearly held that state law governs the question of whether a party has "property or rights to property" to which a lien, whether the Government's or that of a private party, can attach. Thus, in *Aquilino* v. *United States*, 363 U. S. 509 (1960), the Court remanded a case to the New York Court of Appeals for it to consider whether, under New York law, funds held by the owner due to the general contractor constituted "trust funds" for the benefit of subcontractors, laborers, and materialmen so that the general contractor who had defaulted on his federal taxes as well as on his payments to the subcontractors had no "property" or "rights to property" in the fund (at least until all of the laborers, materialmen, and subcontractors had been paid) to which the Government's tax lien could attach.[5]

At the same time, the Court affirmed the Fourth Circuit's holding that North Carolina law gave the general contractor no property interest in the amount due under the general construction contract, except to the extent that such amount exceeded the aggregate of all amounts due to subcontractors. Therefore, the Government could recover only so much of the construction price as would remain unpaid after deduction of a sum sufficient to pay the subcontractors, *United States* v. *Durham Lumber Co.*, 363 U. S. 522 (1960). It should be noted that the money due the general contractor in *Durham Lumber* was not withheld especially for the purpose of protecting

it did not file a lien under the Illinois Oil and Gas Lien Act it still qualified under the definition of mechanics' lienor. 26 U. S. C. § 6323(h)(2).

5. In *Aquilino*, the subcontractors had sued to foreclose their mechanics' liens, but apparently because § 3672 of the Internal Revenue Code of 1939, the predecessor to 26 U. S. C. § 6323, did not give priority to mechanics' liens which attached before the Government's tax lien under § § 3670 and 3671, but were not reduced to judgment until after the lien attached, their liens were of no effect. It was not until 1966 that § 6323 was amended specifically to mention mechanics' lienors and to give them priority over subsequent federal tax liens § 6323(a) and (h)(2).

the owner against liens or to protect subcontractors, but had been withheld because of a dispute over the amount due.

We are in a situation not unlike that found in *United States* v. *Chapman*, 281 F. 2d 862 (10th Cir. 1960). There a telephone company had withheld funds from the general contractor as authorized by the construction contract, which gave it the right to require proof of payment of all materialmen before acceptance of the work. When, after the work on the project had been completed, the general contractor defaulted on both his payments to the subcontractors and his federal taxes, the telephone company brought an interpleader action to determine the rights to the fund. The court cited *Aquilino* to the effect that state law controlled on the issue of whether the general contractor, Sims, had any property right in the retainage to which the Government's tax lien could attach. The court held:

> "That right does not exist because of the failure to pay the labor and material claims. . . . This accords to the general rule, recognized in Oklahoma, that contracts must be performed according to their terms before recovery can be had thereon. As the contractor-taxpayer had no enforceable right to the money covered by the retained percentage, there was no property or right to property to which the tax lien of the United States attached, except to the extent that the retained percentage exceeded the labor and material claims." 281 F. 2d at 866-67 (footnotes omitted).

In response, the Government contended that, since under Oklahoma law the materialmen could not place a lien on the telephone company's property and since they could not sue the telephone company because of lack of privity of contract, they should have no enforceable right to the fund. The court rejected the contention, stating that the Government was merely relying on the weakness of the competing title rather than on the strength of its own claim. "Right to recover from the fund must be based on the strength of a claimant's title and not on the

weakness of the title of another claimant." 281 F. 2d at 867 (footnote omitted). Further, the court went on to hold that under Oklahoma law the materialmen had the right to secure payment from the fund.

We turn then to the issue of (1) whether under Illinois law the United States has a claim to the fund through the rights of Parkhill, Inc., in that fund, and (2) whether under Illinois law the various labor and material claimants have rights in the fund superior to any held by Parkhill, Inc. Under both issues we reach the same result—that the Government and all materialmen and laborers not precluded by judgments which have become final are to share equally in the retainage fund.

Turning to the first issue—whether Parkhill, Inc., has a right to the retainage—we note the uncontested fact that Parkhill, Inc., has not complied (and apparently cannot comply) with the contract terms. No affidavit regarding payment of subcontractors has been filed. In the district court, Natural initially moved to dismiss the third party complaint filed against it on this very ground, that Parkhill's failure to comply with the terms of the contract terminated its rights. The court denied the motion:

> "It seems apparent to this court that whether INC's [Parkhill, Inc.] rights under the contract terms have been terminated or not makes no real difference here. If such rights were held to be terminated on the facts of this case, INC would surely have a cause of action on the basis of *quantum meruit*, or some other equitable theory, for any balance of retainage over valid mechanic's or materialmen's liens, etc., or for the same amount as would be due INC under the express contract terms. Whether INC has a cause of action under the express terms of the contract or not, it does have a cause of action limited to any residue of the retainage which may remain after Natural has discharged its liability to others arising out of INC's breach. Thus, in the opinion of this court, INC does not have any rights against Natural to that part of the retainage which

> Natural may be obligated to pay to others because of INC's breach. It does have a cause of action for any residue, which is contingent upon their [sic] being a residue and upon the amount thereof."

In our opinion, Parkhill's claim to the retainage is not enhanced by a *quantum meruit* or similar theory. The law of Illinois appears to be that Parkhill's rights against Natural if predicated on such an equitable theory must nevertheless proceed on a "substantial performance" showing. "It was therefore held and became the rule in Equity, that if the owner got substantially the thing for which he bargained, he must pay for it, but he was allowed a credit as compensation for the deficiencies existing in what he got as compared to what strict performance would have given him." *Watson Lumber Co.* v. *Guennewig*, 79 Ill. App. 2d 377, 397, 226 N. E. 2d 270 (5th Dist. 1967).

An action in equity claiming substantial performance has as a measure of the recovery the contract price less "an amount necessary to account for the difference between what the owner got by the actual performance as compared to what he bargained for." *Watson Lumber, supra.* The Government and Parkhill, Inc., contend that Natural has not been damaged at all—that in fact the value of the actual performance was the same same as that for which it had bargained—that is, it got a finished pipeline free of all liens. This theory has a facial appeal, but it indicates, in our reading thereof, that Natural desired to have its subcontractors paid regardless of whether or not the subcontractors could assert liens against Natural's property. The fact that an owner may wish to have his subcontractors paid where they have no lien rights was recognized in *Board of Education of City of Chicago* v. *Chicago Bonding and Surety Co.*, 218 Ill. App. 20 (1st Dist. 1920), where the court held that a subcontractor suing in the name of a municipal corporation which could not be sued by the subcontractor could recover on the bond given by the contractor which had promised to pay for all labor and material used. This result was reached despite

the surety's contention that since the bond was to indemnify the Board of Education, which had not been, and could not be, sued and thus had not suffered any damage from the contractor's default, there should be no recovery.

In discussing a similar contract provision, the Ninth Circuit in *Cove Irrigation District* v. *American Surety Co. of New York*, 42 F. 2d 957, 960 (9th Cir. 1930), *cert. denied*, 292 U. S. 891, quoted from *Builders' Lumber & Supply Co.* v. *Chicago Bonding & Surety Co.*, 166 N. W. 320, 321 [167 Wis. 167 (1918)], in which the Supreme Court of Wisconsin said:

> "If that was not deliberately intended for the benefit of third parties—for the benefit of materialmen and laborers —why was it inserted? It was already provided that the contractor should furnish the material and labor for the construction of the work. It was not necessary for the avoidance of mechanics' liens, because the property of a municipality is not subject thereto. It was not necessary to make the contractor personally liable to laborers and materialmen, because that liability would arise from the contracts of employment of laborers and purchase of materials. We cannot assume that this provision was introduced into the contract for its resounding effect or for an idle purpose. *It is highly commendable on the part of municipalities to secure protection for those who render services and furnish materials in and about the construction of their public works. Indeed it is good business policy for them to do so. . . .*" (Emphasis added.)

See also *Harris* v. *American Surety Co. of New York*, 372 Ill. 361, 24 N. E. 2d 42 (1939).

However, the courts have not interpreted the rights and interests of third parties to be limited to contracts in which a public body was the owner and therefore lien-proof. In *Fidelity & Deposit Co. of Baltimore* v. *Rainer*, 220 Ala. 262, 125 So. 55 (1929), the Alabama Supreme Court, on reconsideration, held that a materialman had a direct right of action on a bond to indemnify the owner in a private construction contract where the

bond provided that the general contractor should pay for all labor and materials. The court stated:

> "We are not impressed with that line of judicial decision which assumes that the owner, the promisee, has no concern for those whose labor and material enter into his building, other than mere protection of himself by way of indemnity. He may provide for them a remedy on the bond, to prevent their proceeding against him under the lien laws. He may want the bond to protect them as an assurance that labor and material will be procured and the work done without delay and confusion. *He may require it simply as a just protection to those whose labor and material enter into his building.*" 125 So. at 59. (Emphasis added.)

Thus, it is clear that there are valid reasons for Natural's having bargained for Parkhill, Inc., to pay all laborers and materialmen, irrespective of whether there existed a possibility of liens against its property.

If we look at the words of the construction contract, we find support for the above view that Natural contemplated that either all claims arising from the project would be paid by Parkhill, Inc., or else the retainage found would be available for their payment. Subparagraph .312, besides requiring the affidavit that the contractor has paid all bills and claims for materials, labor, supplies, and equipment, also specifies that the contractor must have paid "contributions, payroll, and payroll taxes, use taxes or other forms of taxes, fees, licenses, excises or payments, required by Federal and state legislation . . . ." As was agreed at oral argument, there was no way that the owner of the property (Natural) could have been liable for the failure of the contractor to pay federal payroll taxes. Unless subparagraph .312 is to be considered a meaningless piece of "boilerplate" in the construction contract, Natural bargained for payment of laborers and materialmen. We know of no reason for Natural not being entitled to performance of this provision of the contract as well as those pertaining to the construction of the pipeline.

In a legal sense, damage was suffered by Natural from the failure of Parkhill, Inc., to pay the subcontractors, materialmen,

laborers, and taxes as it had agreed in the contract, *i.e.*, there was not "substantial performance." It is difficult, if not impossible, to know how to measure such damages suffered by Natural. Suffice it to say that it would not be captious or ingenuous to say that the retainage was in one sense a liquidated damages clause since the measure of damages was so difficult to calculate in advance and the amount could not be deemed a penalty. In this sense, Natural's desire to pay the other claimants to the fund —expressed in its motion to dismiss the initial third party claim of Parkhill, Inc.—reflects a desire to use the retainage, or liquidated damages fund, to remedy as much of the actual damage as possible.

We conclude that Parkhill, Inc., and therefore the Government, has an absolute right to the retainage only insofar as it is not subject to the prior claims of others. We therefore turn to the validity of the claims of the various subcontractors, laborers, and materialmen who are parties to this appeal.[6]

Illinois law is clear that absent proper compliance with the provisions of the appropriate lien statute a subcontractor has no right of action against the owner of property. *Vanderlaan* v. *Berry Constr. Co.*, 119 Ill. App. 2d 142, 255 N. E. 2d 615 (4th Dist. 1970). In *Vanderlaan*, the court refused to consider the type of argument accepted by the district court in *Durham Lumber Co., supra*, similar to a quasi-statutory right of the subcontractor against the owner who has notice of the contractor's default, even though the mechanics' lien statute specifically speaks in remedial terms. Ill. Rev. Stat. 1971, ch. 82, § 39. Further, the court in *Hill Behan Lumber Co.* v. *Marchese*, 1 Ill. App. 3d 789, 275 N. E. 2d 451 (2d Dist. 1971), rejected a similar argument and also held that the subcontractor was not "entitled to an equitable lien on the grounds of unjust enrichment." 275 N. E. 2d at 453.

6. As to all of those claimants to the interpleaded fund who did not appeal the adverse judgments, and whose adverse judgments are final, such judgments may be *res judicata*.

Although it is clear from the above that Illinois courts would not generally recognize a right of action against the owner of property by an unpaid subcontractor, absent compliance with a lien statute, this does not mean that the subcontractors, laborers, and materialmen have no rights in the present case. None of the cases cited by the Government or by Parkhill, Inc., dealt with claims by subcontractors to a retainage fund such as the one before us. As indicated above, it cannot be said that this fund was created solely for the protection of Natural. It covers claims for which Natural could not be held personally liable. In addition, if the retainage were solely for the purpose of protecting Natural from liens and any similar claims, then it would be superfluous since subparagraph .33 gives Natural complete discretion to withhold from any payments "any amount which in its judgment is necessary to secure Company against any and all claims asserted against Company or Contractor and payable by Contractor . . . ."

Since subparagraph .312 cannot be dismissed purely in terms of protection of Natural against liens, upon either of two alternative bases the subcontractors and creditors of Parkhill, Inc., specified in subparagraph .312 are entitled to recover. First, these creditors were the third party beneficiaries to the contract and therefore attained a direct right of action against the fund. Second, even if they had no contractual right in the fund, Illinois courts in the exercise of their equitable powers in a dispute between the contractor, suing in equity under the doctrine of substantial performance, and the creditors of the contractor, claiming equitable rights to the fund through Natural, would, in our opinion, prefer those creditors.

The law of third party beneficiaries has traveled a lengthy road since *Bourne* v. *Mason*, 86 Eng. Rep. 5, 1 Vent. 6 (1669, K. B.), in which the court gave judgment for the defendants in a suit by a creditor beneficiary on the ground that the plaintiff was "a stranger to the consideration," *contra* as to a donee beneficiary, *Dutton* v. *Poole*, 83 Eng. Rep. 523, 2 Lev. 210 (1677,

K. B.). By the nineteenth century, the Exchequer had accepted such causes. In *Robertson* v. *Wait*, 155 Eng. Rep. 1360, 8 Ex. 299 (1853), Baron Parke upheld the right of a third party beneficiary to recover on a trust theory, in spite of the fact that the contract used no trust language nor contained any indication that the contract was for the benefit of the third party. The leading American case initially recognizing the rights of a third party beneficiary to sue on a promise was *Lawrence* v. *Fox*, 20 N. Y. 268 (1859), holding that the plaintiff who was the creditor of Holly could sue the defendant on the defendant's promise to Holly to pay plaintiff Holly's debt when the defendant borrowed a similar sum of money from Holly.

The rule in Illinois presently appears to be "that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon." *Carson Pirie Scott & Co.* v. *Parrett*, 346 Ill. 252, 257, 178 N. E. 498 (1931). To the same effect, *Rhodes Pharmacal Co.* v. *Continental Can Co.*, 72 Ill. App. 2d 362, 369, 219 N. E. 2d 726 (1st Dist. 1966).[7]

With these Illinois cases in mind, we turn to the present case in which the construction contract specifically withholds final payment until the general contractor provides an affidavit that all his bills have been paid. Initially, we should note that there is no problem with the fact that at the time of the signing of the construction contract the specific creditors of Parkhill, Inc.,

7. Recently, the Illinois Supreme Court in *Rozny* v. *Marnul*, 43 Ill. 2d 54, 60, 250 N. E. 2d 656 (1969), declined an opportunity to broaden the rights of third party beneficiaries. In a suit by the purchaser of land against a surveyor who had surveyed property inaccurately so that the vendor had built improvements on an adjacent lot, the court chose to rely on a tortious misrepresentation theory rather than on an expanded third-party beneficiary theory (that is, that the survey was done for the "benefit" of some unknown and ultimate purchaser of the land from the builder) in awarding relief.

were not known. As Corbin stated: "Of course the beneficiary must be identified before he has an enforceable right; but it is not necessary that he should be identified or identifiable at the time the contract is made. It is enough that he be identified at the time performance is due." 4 *Corbin on Contracts* § 781, at 70 (1951).

A materialman may be a third party beneficiary of a promise by a general contractor to obtain a surety bond for the prompt payment of all laborers and materialmen, and, in the context of a government contract, an unpaid materialman of a subcontractor was allowed to sue the general contractor who had failed to provide such a bond as he had covenanted in the construction contract. *Strong* v. *American Fence Constr. Co.*, 245 N. Y. 48, 156 N. E. 92, 94 (1927) (opinion by Cardozo, C. J.): "Security to materialmen and laborers was the end and aim of the transaction. If the promise was not for them, it was without significance or reason." Nor does the promise have to be for the sole benefit of the third party who is suing as long as it was "for his direct or substantial benefit." *Beck* v. *Reynolds Metals Co.*, 163 F. 2d 870, 871 (7th Cir. 1947) (opinion by then Circuit Judge Minton, relying on Illinois cases).

Thus, we need to decide whether there was created a third-party beneficiary relationship for the materialmen, laborers, and other creditors so that they have rights under Illinois law, the creation flowing from the contract requirements that Parkhill, Inc., provide an affidavit of payment before receiving the retainage from Natural coupled with the provision that Natural could, if it so chose, pay any liquidated claims that arose out of the construction contract and charge Parkhill, Inc. Certainly the claimants are direct beneficiaries of the promise, and, although the promise may not have been solely for their benefit but also for the protection of Natural, it must have been substantially for their benefit since some of the specified creditors could not obtain liens against Natural's property, specifically, *e.g.*, the

Government's claim for taxes. As noted above, a similar analysis has been applied to cases involving materialmen attempting to recover on a contractor's bond on a government job. See *Southwestern Portland Cement Co.* v. *Williams*, 32 N. M. 68, 251 P. 380 (1926); *Board of Education of City of Chicago* v. *Chicago Bonding and Surety Co., supra.*

It would appear, therefore, that the various parties specified in subparagraph .312 do have a right to sue for their unpaid bills to the extent of the retainage fund available. Whatever funds that are still being retained by the owner of the property are subject to such a third-party beneficiary's suit. As Professor Corbin has stated, "they [courts] may well interpret a bond [or retainage] that is expressly conditioned on the payment of laborers and materialmen as being a promise to pay them and made for their benefit. The words reasonably permit it, and social policy approves it." 4 Corbin, *supra* § 800, at 177-78. (Footnote omitted.)

However, in our opinion, even if the Illinois courts would not give the claimants a direct right to the retainage fund as third party beneficiaries, we would still reach the same result. Although the general right of a materialman or subcontractor to an equitable lien against the property of the owner, if he has failed to perfect his statutory lien was rejected in *Hill Behan Lumber Co.* v. *Marchese, supra,* this does not mean that Illinois courts would refuse to impose an equitable lien on retainage funds such as we have in the present case. The entire thrust of the court's decision in *Hill Behan Lumber* was that since statutory liens are in derogation of the common law the claimant must strictly comply with all of the statutory prerequisites in order to obtain any rights. This does not reflect on whether or not equity would impose a trust on certain funds specifically retained under the construction contract by the owner in part to protect the materialmen, laborers, and subcontractors.

"The essential elements of equitable liens include (1) a debt, duty or obligation owing by one person to another . . . , and

(2) a res to which that obligation fastens, which can be identified or described with reasonable certainty." *Marshall Savings & Loan Ass'n* v. *Chicago National Bank*, 56 Ill. App. 2d 372, 378, 206 N. E. 2d 117 (2d Dist. 1965). In the present case, we have both of the elements for an equitable lien. As we have seen above, there was a duty, created by the construction contract's own language in the subparagraphs relating to the retainage, which ran from Natural to the subcontractors, laborers, and materialmen. This duty, however, related only to the specific res to which it fastened—the retainage fund. It is in this way that the *Hill Behan Lumber* case is distinguishable, since in that case there was no specifically created contractual duty nor a specific res to which the duty attached.

Further, even if there were no specific contractual duty created by the contract, equity might well imply one insofar as the retainage fund was concerned. As the Eighth Circuit stated in *Theater Realty Co.* v. *Aronberg-Fried Co., Inc.*, 85 F. 2d 383, 388 (8th Cir. 1936), Pomeroy [3 Pomeroy, Eq. Jr. (4th Ed.) § 1239] notes that equitable liens may originate in express contracts, but

> "the rule is not limited to specific agreements, for, 'in addition to the general doctrine that equitable liens are created by executory contracts which in express terms stipulate that property shall be held, assigned, or transferred as security for the promisor's debt or other obligation, there are some further instances where equity raises similar liens without agreement therefor between the parties, based either upon general considerations of justice (ex aequo et bono) or upon the particular equitable principle that he who seeks the aid of equity in enforcing some claim must himself do equity.' "

As the same circuit said in *United States Fidelity & Guaranty Co.* v. *Sweeney*, 80 F. 2d 235, 238 (8th Cir. 1935), "Laborers and materialmen, however, have an equitable right to payment from funds due a contractor on a public improvement in preference to general creditors. . . . There is a recognized equitable

right of unpaid furnishers of labor or materials to such part of the contract price as may remain in the possession of the government after the completion of the work by the contractor."

In any event, we are confident that if the Illinois courts had been confronted with the issue of priority of funds held as retainage, in part for the payment of subcontractors, laborers, and materialmen, an issue on which none of the parties has cited a controlling case, they would reach a similar conclusion. Justice clearly compels such a result, especially when we note that the general contractor, whose claim to the retainage fund in equity is by way of a claim of substantial performance, does not have clean hands relative to the claims of the unpaid subcontractors, materialmen, and laborers.

We draw support for this view from *Pearlman* v. *Reliance Insurance Co.*, 371 U. S. 132 (1962), in which the Supreme Court had to decide who had priority to a retainage fund such as we have here. The surety on the performance bond had paid all of the contractor's bills for labor and materials and sought to obtain the retainage fund as a partial reimbursement. The contractor's trustee in bankruptcy opposed the claim arguing that the surety was just another creditor and that the retainage fund was an asset of the bankruptcy estate. The Supreme Court held that the surety could recover as subrogee of the laborers and materialmen (see concurring opinion, 371 U. S. at 142):

> "We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it." 371 U. S. at 141. (Footnote omitted.)

Thus, the Court held the rights to the retainage fund of those taking through the rights of the materialmen (*i.e.*, the surety)

to be superior to those taking through the rights of the general contractor (*i.e.*, the trustee in bankruptcy). Similarly, in *American Surety Co.* v. *Westinghouse Electric Manufacturing Co.*, 296 U. S. 133 (1935), the Court held in reference to priority to a retainage fund on a Government contract that the materialmen had superior rights to those of the surety who was claiming as the subrogee of the general contractor.

In summary, we are of the opinion that, on this matter of first impression in Illinois, under either of the legally acceptable theories the Illinois courts would hold that those classes of creditors specifically identified in subparagraph .312 have rights to the retainage fund.[8] Thus, Parkhill, Inc.'s interest in the fund is limited to any residue after all valid claims properly before the court have been paid in full. Since most of the claimants have not appealed the district court's granting of summary judgment against them, such rights as they otherwise would have had may have been waived.[9] Insofar as the other claimants who are presently before us are concerned, including the United States, since federal withholding taxes are specifically mentioned in subparagraph .312, we interpret the contract as allowing them to share in a pro rata fashion to the amounts of their claims arising out of this particular construction project. Since, at oral argument, it was contended that some of the claims against Parkhill, Inc., are based on other construction projects, we

8. Since it is clear that Natural was interested in protecting itself and its property against any liens, it would be logical in interpreting the clause to say that any party with a valid lien against Natural's property under the Illinois Oil and Gas Lien Act would have priority to the extent of such lien. But as there are no such liens in the present case, we do not have to decide that question. We do note that such an approach would be consistent with the language of the predecessor to the Miller Act which gave claims of the Government priority in payment over claims of the materialmen. *American Surety Co.* v. *Westinghouse Electric Manufacturing Co.*, 296 U. S. 133, 135 (1935).

9. Since the matter was not raised in this appeal, we have expressed no opinion as to whether there is any legal basis for the dismissed claimants in this *in fieri* litigation to seek successfully to set aside the adverse judgments against them.

remand to the district court to ascertain the facts and, if this is true, to reduce the claims by any such amount. Further, it is necessary for the district court to adjudicate the validity and the precise amount of the Government's tax claim before any pro rata distribution can be made. Parkhill has indicated that the amount is overstated and will be actively contested.

As we noted in the statement of this case, the district court in allowing the Laborers' claim also granted attorneys' fees of $4,275.00. Whether or not this allowance should be included in the initial sharing of the retainage is not an easily resolvable question. If the claim were derivable through Parkhill, then the statutory provision for attorneys' fees in suits for wages would indubitably be applicable. The claims, however, do not come through Parkhill. We have assumed, without expressly articulating the thought, that the total of the claims will exceed the amount of the retainage. If that assumption is correct, and it usually seems to be in this type of litigation, then other claimants will be proportionately deprived when the pro rata processing occurs. The legislature of Illinois by enacting Ill. Rev. Stat. ch. 13, § 13, obviously desired to make unpaid laborers whole without their having to bear collection expenses. While paying due respect to this laudable motivation, we are of the opinion that the allowance of claims at this point should be limited to the unpaid claims themselves and should not include collection costs such as attorneys' fees. Accordingly, the attorneys' fees will not be properly allowable on the Laborers' claim. Of course, if our assumption on the relationship of assets to claims is incorrect and there should be a surplus returnable to Parkhill, Laborers would be in a position to proceed toward recovery of the statutorily allowed fees.

There is one other claimant to this fund whom we must consider. The district court in its Decision and Order granted priority to the claim of an attorney for Parkhill, Inc., one Frank O. Wetmore, II, in the amount of $11,075.00. Wetmore had filed a notice of attorney's lien against the retainage, pursuant to

Ill. Rev. Stat. 1971, ch. 13, § 14, for his services in allegedly making most of the retainage available to the Government. Mr. Wetmore alleged that it was due almost entirely to his efforts that the claims of the various laborers and materialmen against the fund were disallowed. He filed the various interrogatories, the answers to which showed that no claimant had perfected a lien under the Illinois Oil and Gas Lien Act. He also filed the motions for summary judgment against those claimants, most of which motions were granted by the district court. Wetmore's claim of priority over the Government is based upon 26 U. S. C. § 6323(b)(8). The Government in cause No. 72-1899 contends that priority was improperly granted under that section because Wetmore did not independently produce the fund; it was obtained by Natural's decision to interplead it.

Because of the decision we have reached above with respect to the rights to the retainage of various creditors of Parkhill, Inc., we do not have to resolve the controversy. Since we have held that the Government's rights to a portion of the retainage arise from its being listed as one of the classes of creditors in subparagraph .312, rather than from the federal tax lien statute, Wetmore cannot claim any right under 26 U. S. C. § 6323 (b)(8).

II

The second fund involved in this appeal is the residue which resulted from the sale of construction equipment after a chattel mortgagee was paid. The priority of the chattel mortgage was established in *Avco Delta Corporation Canada Ltd.* v. *United States*, 321 F. Supp. 241 (S. D. Ill. 1971), *aff'd*, 459 F. 2d 436 (7th Cir. 1972). The residue fund is approximately $600,000.00. The Government has filed a tax lien against this fund. The various Parkhill Companies contend that the Government is now taking a position inconsistent with that advanced in the prior litigation in this court. Parkhill petitioned the district court for a partial release of the escrow fund on the basis that the Government has "seized and tied up *all* of the assets"

of the various Parkhill Companies, that the inconsistent position of the Government is due to the fact that Parkhill has substantial defenses to the Government's claim, and that the Government's actions "deny the constitutional guarantees of due process and representation by and assistance of counsel contained in the Fifth and Sixth Amendments to the United States Constitution." The district court ordered "[t]hat $60,000 be released from said escrow fund . . . to be drawn on now and in the future by [Parkhill] INC., [Parkhill] LTD., and [Parkhill] Construction for the payment of costs and attorney's fees now accrued and owing, or necessarily accruing in the future, for the proper and effective representation of INC, LTD, and Construction in this action."[10]

Insofar as the district court granted a partial release of funds to pay already accrued legal expenses, it was in error since the payment of those expenses does not clearly affect the ability to obtain counsel in *future* proceedings. But we are also compelled to reverse the entire release of funds on the basis of prematurity as required by our decisions in *Illinois Redi-Mix Corp.* v. *Coyle*, 360 F. 2d 848 (7th Cir. 1966), and *United States* v. *Brodson*, 241 F. 2d 107 (7th Cir. 1957) (*en banc*), *cert. denied*, 354 U. S. 911. The facts of the present case are basically indistinguishable from those in *Illinois Redi-Mix Corp., supra.* In both cases there was an interpleaded fund with claims put forth by general creditors of the taxpayer, the taxpayer itself, and the Government. In both cases it was alleged that all of the assets of the various corporation-taxpayers were subject to notices of levy or impounded in the interpleader action. This court stated, in reversing the district court's order allowing a partial release,

> "The claim, in substance, is that the vendor corporations will be denied a fair trial in the Tax Court at some

10. The relationship between Canadian Parkhill Pipe Stringing Ltd., which is the sole shareholder of the taxpayer, Canadian Parkhill Pipe Stringing, Inc., d/b/a Parkhill Pipeline, Inc., and the chattel mortgage debtor, Canadian Parkhill Construction Equipment, Ltd., is set out in some detail in *Avco Delta Corporation Canada Ltd.* v. *United States*, 459 F. 2d 436 (7th Cir. 1972).

> time in the future if a portion of the interpleaded fund is not released. But it is presently impossible to determine whether any constitutional violations will occur; that can be decided only after the trial. Therefore, the issue is not ripe for judicial determination. . . . The constitutional question in this case was prematurely decided." 360 F. 2d at 849-850.

The Parkhill Companies attempt to distinguish their case from *Illinois Redi-Mix* on the ground that in their case the Government has seized the property not only of the allegedly delinquent taxpayer, but also of two corporations, Construction and LTD, against whom there is no outstanding tax liability. Admittedly, the Government does rely on either an alter ego theory or a fraudulent transfer theory. But we do not see that this truly distinguishes the case from *Illinois Redi-Mix*. If, as the Government alleges, there has been a fraudulent transfer or the various corporations are mere alter egos, then the Government would have a right to proceed against the property. The contention that the Government's actions will cause an unfair trial in the future is still capable of determination only after that trial takes place.

Furthermore, we note that the result we have reached in the first part of this case will provide an incentive for the various creditors of Parkhill, Inc., to dispute the validity of the Government's tax claims in order to reduce the total claims being brought against that fund. Thus, Parkhill may through this source receive additional aid in any further proceedings in the district court. In conclusion, we reverse the allowance of partial release of funds to the Parkhill Companies. The Government should be on notice, however, that we will carefully scrutinize any further appeals to see if in fact Parkhill has been denied due process of law by a constitutionally violative overreaching by the Internal Revenue Service.[11]

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11. In its brief in this court, Canadian Parkhill makes reference to *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). Clearly *Fuentes* and *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), undercut

For the reasons hereinbefore given, the judgments of the district court are reversed and the causes remanded for further proceedings not inconsistent herewith.

REVERSED and REMANDED.

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the constitutionality of most summary prejudgment remedies. But since the total invalidity of the Government's tax lien and jeopardy assessment was never presented to the district court, nor actually presented to this court, we will not intimate any view on the issue.